

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

SUSAN CURWEN,

Plaintiff,

vs.

MARK J. DYNAN; MARK W.
CONFORTI; GIERKE, CURWEN, P.S.,

Defendants.

No. 3:11-cv-05598-BHS

DEFENDANT GIERKE, CURWEN, P.S.'S
MOTION TO AMEND CASE SCHEDULING
ORDER AND BRIEFLY STAY
DISCOVERY PENDING MEDIATION

NOTED FOR HEARING:
APRIL 6, 2012

I. INTRODUCTION

Defendant Gierke Curwen, PS (the "Firm") requests the Court amend its Minute Order Setting Jury Trial and Pretrial Dates and Ordering Mediation ("Minute Order"). (ECF No. 25). The Firm believes that amending the case scheduling order will promote early resolution in this matter, and the companion case of *Curwen v. Dynan*, brought by Ms. Curwen's husband Gregory Curwen. In addition, based on the prior efforts of the parties in these cases in regard to mediation and arbitration, amending the case scheduling order will promote the ends of justice by permitting the parties sufficient time to prepare for trial.

Mediation is currently set in this case for May 8, 2012. The Firm requests that this Court also briefly stay discovery in this case to avoid the prohibitive costs of recent discovery that may be rendered moot by the mediation that is set to occur in just several weeks.

II. FACTS

This case is companion litigation to the case of *Gregory B. Curwen v. Mark J. Dynan, Mark W. Conforti, Gierke, Curwen, P.S.*, Superior Court of Washington in and for Pierce County, case number 11-2-12271-4 (“the Gregory Curwen case”). *See* (ECF No. 18, Ex. 2). The claims in the Gregory Curwen case are subject to contract mediation and arbitration and are not subject to a Superior Court case scheduling order. (ECF No. 18, Ex. 3). The plaintiffs in the two cases, Gregory Curwen and Susan Curwen, are husband and wife, and their claims arise out of their employment with the Firm. (ECF No. 1 at 1 ¶ 1). Mr. and Mrs. Curwen are both represented by attorney William Smart and Keller Rohrbach LLP. *See* (ECF No. 1 at 7); (ECF No. 18, Ex. 2 at 15).

Mrs. Curwen asserts claims for (1) unlawful sex discrimination, (2) unlawful marital status discrimination, (3) unlawful age discrimination, (4) unlawful retaliation, (5) wrongful termination, (6) outrage, (7) intentional infliction of emotional distress, (8) termination due to whistle-blowing, (8) breach of contract, (9) damages for back pay, (10) damages for front pay, (11) damages for emotional distress, anxiety, mental anguish, (12) pre-judgment interest on back pay, (13) punitive damages, (14) post-judgment interest, (15) attorney fees and costs. (ECF No. 1 at 4-6). It is anticipated that the documentation that eventually will have to be located, reviewed, and produced, might be in the range of ten to twenty thousand pages of records. Declaration of Marc Rosenberg (“Rosenberg decl.”) at ¶ 2. The parties’ initial disclosures in the Susan Curwen case identify thirty-five witnesses. *Id.* Also, based on the claims and the defenses, it is reasonable to estimate approximately six to eight expert witnesses will be presented in the case for all parties. *Id.*

In the Gregory Curwen case the agreements require that mediation be held before the parties engage in the formal arbitration discovery process. (ECF No. 18, Ex. 1 at ¶ 16.3) (“As a precondition of the demand for arbitration the parties agree that they shall participate in a one-

1 day, non-binding mediation of the dispute(s)"). In the Susan Curwen case, the parties have,
 2 until recently, followed a similar approach and have not conducted formal discovery. In order
 3 to reduce litigation costs and to reduce animosity, the parties delayed written discovery and
 4 depositions in the Susan Curwen case as well as in the Gregory Curwen case. The parties
 5 recognized it was best in these cases to first try to resolve the claims rather than to litigate the
 6 claims and perhaps further polarize the parties' positions.

7 It has taken the parties a considerable amount of time to agree on a mediator and a
 8 mediation date. Rosenberg decl. at ¶ 4. There are voluminous emails and correspondence on
 9 these issues in the two cases that could be submitted to support this proposition, but the Firm
 10 chooses not to flood the Court with documents. The parties recently agreed Judge Terrence
 11 Carroll (retired) will act as the mediator of the claims, and the mediation date is May 8, 2012.
 12 *Id.* The parties recently agreed that the arbitrator for the Gregory Curwen case will be Judge
 13 Steven Scott (retired). *Id.*

14 The case schedule deadlines in the Susan Curwen case are approaching. (ECF No. 25).
 15 Apparently, due to the pending deadlines, Mrs. Curwen's attorneys recently sent notice of a
 16 videotaped 30(b)(6) deposition of Gierke, Curwen, P.S. Rosenberg decl., Ex. 1 [Dep. Notice].¹
 17 The notice lists twenty-two subjects and types of records that the designated witness(es) is
 18 directed to be ready to testify about, and the notice directs the Firm to bring to the deposition
 19 various categories of documents. *Id.* The Deposition Notice represents that the Firm is required
 20 to provide deponents to testify, and is "required to produce any and all documents relating to"
 21 the following categories:

- 22 1. Susan Curwen.
- 23 2. Greg Curwen.

24
 25 ¹ The Firm believes that there are deficiencies in regard to the deposition notice, but will not raise issues regarding the deficiencies at this point.

- 1 3. Susan Curwen's employment.
- 2 4. Greg Curwen's employment.
- 3 5. All claims of employment discrimination made against the firm in the
- 4 past 10 years.
- 5 6. All investigations conducted by or for the firm into allegations of
- 6 employment discrimination made against the firm in the past 10 years.
- 7 7. All claims of retaliation made against the firm in the past 10 years.
- 8 8. All investigations conducted by or for the firm into allegations of
- 9 retaliation made against the firm in the past 10 years.
- 10 9. Susan Curwen's employment contract.
- 11 10. The firm's policies, protocols, or procedures relating to employment
- 12 discrimination.
- 13 11. The firm's policies, protocols, or procedures relating to employee
- 14 reviews.
- 15 12. Statements made by Mark Dynan or Mark Conforti regarding Susan
- 16 Curwen.
- 17 13. Statements made by Mark Dynan or Mark Conforti regarding Greg
- 18 Curwen.
- 19 14. Emails or other correspondence involving Mark Dynan and/or Mark
- 20 Conforti regarding Susan Curwen.
- 21 15. Emails or other correspondence involving Mark Dynan and/or Mark
- 22 Conforti regarding Greg Curwen.
- 23 16. The employment of Ginger Bagley, including the hiring, training,
- 24 supervision, and retention of Ginger Bagley.
- 25 17. The computer hard drive for each computer used by Mark Dynan, Mark
- Conforti, Susan Curwen, or Greg Curwen in the past four years.
18. The allegations in plaintiff's complaint.
19. The defenses asserted by the firm.
20. Each document, file, memorandum, or other written or recorded
- document relating to any of the above topics.
21. Pay of all employees.

22. Discipline or termination against any employees.

Rosenberg decl., Ex. 1.

It is anticipated that the location, accumulation, and review of those records will take a considerable amount of time for the employees and attorneys, and result in disruption to the work of the defendant law firm, in addition to expenditure of significant legal fees by all parties. Rosenberg decl. at ¶ 6. The Firm, and presumably all of the parties, wants to reduce the time, expense, and possible acrimony that will be associated with fully litigating either of the cases. *Id.* In the Gregory Curwen arbitration case, the agreements at issue provide for mediation before the arbitration process can begin. (ECF No. 18, Ex. 1 at ¶ 16.3). In order to focus completely on the mediation process and to avoid the time, expense, and acrimony, the Firm requests that the Minute Order be amended to allow the parties enough time to complete the mediation process before having to engage in the discovery process. The Firm requests that the trial date and the case schedule deadlines be adjusted by five months and that formal discovery shall be stayed until the mediation is held.

Counsel for the Firm has in good faith conferred with other affected parties in an effort to resolve the dispute without court action. However, the Firm was unable to obtain Plaintiff's agreement to amend the case schedule and/or stay discovery.

III. ARGUMENT AND AUTHORITIES

A. Motion to amend the case scheduling order.

A scheduling order may be modified for good cause and with the judge's consent. Fed. R. Civ. P. 16(b)(4). The district court "is given broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order ... will not be disturbed unless they evidence a clear abuse of discretion. *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 984 (9th Cir. 2011) *cert. denied*, --- S.Ct. ----, 2012 WL 538393 (U.S. Feb. 21, 2012). "[T]he focus of the inquiry is upon the moving party's reasons for seeking modification." *Id.*

1 The Court's Minute Order requires the parties to participate in a settlement conference
 2 and mediation pursuant to Local Rule CR 39.1. (ECF No. 25). "The court finds that the use of
 3 alternative dispute resolution procedures promotes timely and affordable justice while reducing
 4 calendar congestion." CR 39.1(a)(1). "Litigants in all civil cases subject to this rule shall
 5 consider the use of ADR procedures at all appropriate stages in the litigation, including the
 6 early stages of the litigation." CR 39.1(a)(5). "As the case proceeds, if counsel for any party
 7 concludes that an ADR procedure would have a significant possibility of fostering an early and
 8 inexpensive resolution of the case, that counsel shall so advise the court and all other counsel in
 9 writing." CR 16(b). "The court may, by order in a specific case, modify or forego any of the
 10 procedures or deadlines set forth in this rule." CR 16(m)(2).

11 In this case, the Parties have devoted a significant amount of time in trying to resolve
 12 the instant case and the Gregory Curwen through alternative dispute resolution, without having
 13 devoted the substantial means that would be necessary to fully engage in formal discovery.
 14 Rosenberg decl. at ¶ 3-4. The Parties have finally succeeded in choosing a mediator acceptable
 15 to all Parties in this case, and the Gregory Curwen case, and they have set a mediation date of
 16 May 8, 2012. Id. at ¶ 2-3. However, because of its devotion to attempts to resolve this case,
 17 and the related Curwen case short of full formal litigation, it would be very difficult for the
 18 Firm to meet the current case scheduling order, especially in regard to the disclosure of expert
 19 witness reports, which is set to occur on June 4, 2012. (ECF No. 25). The Firm also notes that,
 20 in the Joint Status Report and Discovery Plan, Defendants indicated their belief that they could
 21 be ready for trial by March 2013. (ECF No. 23 at 4 ¶ 12). The Court ultimately set the trial for
 22 December 11, 2012. (ECF No. 25).

23 The Civil Rules "should be construed and administered to secure the just, speedy, and
 24 inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. While it may
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1 not be quite as speedy, amending the case schedule may well lead to a more just and
 2 inexpensive resolution to the issues involved in this case, and in Greg Curwen's companion
 3 case. Early and inexpensive resolution of disputes will not be promoted by encouraging the
 4 parties to engage in written discovery, depositions, discovery motions, records location and
 5 review and production, and expert witness retention and record review and report writing,
 6 especially where such discovery has been reserved until immediately before mediation is set to
 7 occur. Amending the case scheduling order will not prejudice Ms. Curwen. Therefore, the
 8 Firm requests that the trial date and the case schedule deadlines be adjusted by five months.

9
 10 **B. Motion to stay discovery for six weeks, to May 8, 2012, to permit mediation
 to occur prior to expansive discovery.**

11 The court has broad discretionary powers to control discovery. *Little v. City of Seattle*,
 12 863 F.2d 681, 685 (9th Cir.1988). The court may limit discovery upon showing of good cause.
 13 Fed. R. Civ. P. 26(c). For example, a court may relieve a party of the burdens of discovery
 14 while a dispositive motion is pending. *DiMartini v. Ferrin*, 889 F.2d 922 (9th Cir.1989),
 15 amended 906 F.2d 465 (9th Cir.1990); *Rae v. Union Bank*, 725 F.2d 478 (9th Cir.1984).

16 Here, early and inexpensive resolution of disputes will not be promoted by encouraging
 17 the parties to engage in written discovery, depositions, discovery motions, records location and
 18 review and production, and expert witness retention and record review and report writing. In
 19 fact, at this point, subjecting the Firm to this discovery immediately before mediation would
 20 present the complete antithesis of setting the stage for an amicable resolution. This is
 21 especially so where attorney fees are a potential issue, as in this case. Permitting excessive
 22 discovery, such as would be entailed in providing documents related to Plaintiff's 30(b)(6)
 23 deposition notice, *see* Rosenberg decl., Ex. 1, would primarily serve to greatly drive up the cost
 24 of litigation just before mediation and reduce the chance of amicably resolving this case. The
 25 stay requested by the Firm is very brief, only about six weeks, and would last only until after

1 mediation has been held in this matter on May 8, 2012, and it is possible that there would be no
 2 need for any discovery after that date if the matter resolves.

3 In the recent case of *ArrivalStar, S.A. v. Blue Sky Network, LLC*, 2012 WL 588806
 4 (N.D. Cal. Feb. 22, 2012), defendant Blue Sky moved to stay discovery pending mediation “to
 5 avoid any further unnecessary expenses in defending against this action.” Blue Sky asserted
 6 that “needless discovery would be a waste of time, effort, and resources for counsel and the
 7 litigants, and might in fact chill an appropriate resolution of this matter.” The Court concluded
 8 that Blue Sky had shown “good cause” to justify a stay of discovery pending mediation, and
 9 found that staying discovery pending mediation would conserve the resources of the parties and
 10 would not impose an inequity on any party.

11 The facts of this case are in some ways similar to *ArrivalStar* in that the Plaintiff has
 12 noted a deposition while mediation is already pending. And, like *ArrivalStar*, briefly
 13 suspending discovery would avoid needless waste of time, effort, and resources for counsel and
 14 the litigants, and the chilling effect that discovery might have on the mediation; and, at the
 15 same time, would conserve the resources of the parties, would not impose an inequity on any
 16 party, and could contribute to the amicable resolution of the case without litigation.

17 The Firm further notes that, even if the mediation were not pending, it would be proper
 18 to quash some of the requested discovery in that it: (a) infringes on the privacy rights of non-
 19 parties, and (b) is ambiguous and over-burdensome in its scope. Rather than engage in a knock
 20 down drag out discovery battle at this stage of the litigation, it would be better for the Court
 21 merely to stay discovery until after mediation and see if such battles may be avoided.

22 For example, some of the documents demanded include the personnel files of non-party
 23 employees. For example, in *City of Santa Ana*, 936 F.2d 1027, 1034 (9th Cir. 1990), plaintiffs
 24 filed a complaint against the City of Santa Ana alleging violation of civil rights and
 25

1 employment discrimination. Plaintiffs moved for discovery of personnel files and the
 2 defendants sought a protective order to limit plaintiffs' discovery. The district court granted
 3 the protective order in part, limiting the discovery to (1) statistical data, compiled by the
 4 defendant, (2) comparative data regarding the compensation of members of the employees,
 5 with no identification of members beyond ethnic and sex classifications. On appeal, the Ninth
 6 Circuit held:

7 While these [personnel] files are not absolutely privileged, the confidential
 8 nature of the employee personnel files suggests that opening the files to the
 9 plaintiffs for a general search could reach well beyond the legitimate inquiries
 10 necessary to this litigation and would impact disciplinary procedures within the
 11 SAPD....

12 The district court did not abuse its discretion in denying access to these files.
 13 While plaintiffs demonstrate the relevance of statistics to their suit, they fail to
 14 show that discovery of the actual files was necessary. Focused discovery could
 15 have been employed.

16 *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1034 (1990).

17 In *White v. City of San Diego*, 605 F.2d 455 (9th Cir. 1979), plaintiff filed suit alleging
 18 that she had been discriminated against on the basis of sex in her attempt to obtain promotion to
 19 higher level positions. Plaintiff sought the personnel file of an employee who had been
 20 promoted to a higher level accountant position during the time when the employer allegedly
 21 discriminated against women. The defendant sought a protective order precluding discovery of
 22 this information, and submitted an affidavit stating why the information was privileged. The
 23 plaintiff responded that the information was "vital." The district court entered a protective order
 24 denying discovery of this information. On appeal, plaintiff claimed that she was improperly
 25 denied discovery but did not specify to the court why the material was needed. The court of
 appeals stated that without more evidence from the plaintiff justifying the need for the
 employment file, it could not be said that the district court abused its discretion.

1 In *Knoll v. AT&T*, 176 F.3d 359, 365 (6th Cir. 1999), plaintiffs contended the district
 2 court abused its discretion by granting AT&T a protective order limiting access to personnel
 3 files of nonparty AT&T employees. The Sixth Circuit affirmed the district court, holding:

4 Such protective orders are commonly granted, however, as a means of
 5 protecting the privacy interests of nonparties while yet serving the needs of
 6 litigation ... Courts have also specifically granted such orders to protect
 7 nonparties from the harm and embarrassment potentially caused by
 8 nonconfidential disclosure of their personnel files. (citations omitted) ...
 9 personnel files might contain highly personal information such as an
 10 individual's unlisted address and telephone number, marital status, wage
 information, medical background, credit history (such as requests for
 garnishment of wages), and other work-related problems unrelated to plaintiff's
 claims ... It is clear that defendants had a valid interest in the privacy of
 nonparty personnel files and that it was within the district court's power to grant
 the challenged protective order.

11 *Id.* at 365.

12 The Federal Rules clearly do not give the plaintiffs a license to rummage through the
 13 private information of the District's non-party employees. *Sanchez v. City of Santa Ana*, 936
 14 F.2d 1027, 1034 (1990). In addition, responding to such requests would be incredibly over-
 15 burdensome to the Firm. Indeed, in light of the relevancy of the personnel files, coupled with
 16 the very significant privacy concerns, such requests for production should be precluded or
 17 limited to relevant records. *Id.*; *White v. City of San Diego*, 605 F.2d 455, 460 (9th Cir. 1979);
 18 *United States v. Cadet*, 727 F.2d 1453, 1467 (1984).

19 Likewise, Plaintiff makes other over-burdensome demands, such as demanding the
 20 computer hard drive for each computer used by Mark Dynan, Mark Conforti, Susan Curwen, or
 21 Greg Curwen in the past four years; all investigations conducted by or for the firm into
 22 allegations of employment discrimination made against the firm in the past 10 years; and each
 23 document, file, memorandum, or other written or recorded document relating to any of the
 24 topics listed. These requests are rife with documents that implicate the privacy on non-parties,
 25

1 contain attorney client privileged documents, and are very over-burdensome. Rather than fight
 2 this battle now, the issues may resolved merely by way of a short stay of discovery.

3
 4 Counsel for the Firm has in good faith conferred with other affected parties in an effort
 5 to resolve the dispute without court action. However, the Firm was unable to obtain Plaintiff's
 6 agreement to strike the 30(b)(6) deposition and/or stay discovery.

7 **IV. CONCLUSION**

8 The Firm requests that this Court enter an order amended the case scheduling order and
 9 continuing all dates for a period of five months, in order to permit the parties to fully engage in
 10 efforts to resolve this matter with alternative dispute resolution, which is already scheduled for
 11 May 8, 2012. The Firm also requests that the Court briefly stay discovery until May 8, 2012,
 12 when mediation is scheduled to occur.

13 **V. PROPOSED ORDER**

14 A proposed order is being submitted with this motion.

15 Respectfully submitted March 29, 2012.

16 LEE SMART, P.S., INC.

17 By: s/ Marc Rosenberg

18 Joel E. Wright, WSBA No. 8625

19 Michelle A. Corsi, WSBA No. 24156

20 Marc R. Rosenberg, WSBA No. 31034

21 Attorneys for Defendant

22 Gierke, Curwen, P.S

23 701 Pike Street, Suite 1800

24 Seattle, WA 98101

25 206-624-7990

jw@leesmart.com; mac@leesmart.com;

mr@leesmart.com

DECLARATION OF SERVICE

I hereby certify that on the date provided below, I electronically filed with the Clerk of the Court using the CM/ECF system the foregoing motion, and Declaration of Marc Rosenberg in support of the motion, which will send notification of filing to the following individuals:

Mr. William C. Smart
Mr. Isaac Ruiz
Keller Rohrbach, LLP
Washington Mutual Tower
1201 Third Avenue, Suite 3200
Seattle, WA 98101
(206) 623-1900

Mr. Michael Griffin
Mr. David Black
Jackson Lewis LLP
600 University Street, Suite 2900
Seattle, WA 98101
(206) 405-0404

John T. Dalton
Merrick, Hofstedt & Lindsey, P.S.
3101 Western Avenue, Suite 200
Seattle, WA 98121
(206) 682-0610

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct, to the best of my knowledge.

DATED March 29, 2012, at Seattle, Washington.

LEE SMART, P.S., INC.

By: s/ Marc Rosenberg
Marc Rosenberg, WSBA No, 31034
Of Attorney for Defendant
Gierke, Curwen, P.S

701 Pike Street, Suite 1800
Seattle, WA 98101
206-624-7990
mr@leesmart.com